

Chapter 8

MANAGING / MONITORING THE CONTRACT

Once you have a signed contract and the service provider has begun work, it is important to monitor the service provider's performance under the contract and to promptly deal with any problems that arise. This is often referred to as contract management. Monitoring performance under the contract is also required by the Accountable Government Act. See Iowa Code section 8.47. Chapter 10 contains information about the types of monitoring clauses described in the administrative rules that implement the Accountable Government Act as it relates to services contracting.

8.1 8.1 MONITORING CONTRACT PERFORMANCE

Monitoring means any planned, ongoing, or periodic activity that measures and ensures contractor compliance with the terms, conditions, and requirements of a contract. The annotated Model Contract in Appendix I includes an example of a set of contract clauses that may be used to spell out contract management procedures in the contract itself.

- • **The purpose of monitoring is to assist the contractor in**
 - – Complying with the terms and conditions of the contract and applicable laws and regulations.
 - – Preventing non-compliance by identifying and resolving potential problems by providing constructive, timely feedback.
 - – Making progress toward the expected results and outcomes.

While the contractor has responsibility to perform under the terms of the contract, the state agency has responsibility for reasonable and necessary monitoring of the contractor's performance. Effective contract monitoring can assist in identifying and reducing fiscal or program risks as early as possible, thus protecting public funds.

Monitoring may be viewed as:

- – A preventative function.
- – An opportunity to determine the need for technical assistance.
- – A valuable source of information concerning the effectiveness of services and service delivery methods.

You should plan on identifying an individual in your agency to serve as the contract manager. Although the contract manager may delegate certain functions, the contract manager provides the principal contract management and monitoring function and is the person responsible for ensuring that the management and monitoring functions are done and done well. The contract manager provides the principal contract management and monitoring function. The chief objective of the contract manager is to ensure that the contractor fulfills all contractual obligations in a quality manner within schedule and within budget. To accomplish this task, the contract manager must be completely knowledgeable of the terms of the contract and maintain requisite controls throughout.

To effectively manage the contract, the contract manager should establish controls and monitor performance to ensure all work is completed within the requirements of the contract. To get good results from a contractor, precise performance objectives must be set. The contractor needs to know exactly what is expected and when it is expected. The mechanism for monitoring the contract should be set out in the contract. Appendix J contains a possible format and example of a tool that you might be able to use for monitoring a contract.

By assuming a dynamic role in contract administration, the contract manager is more likely to discover and resolve problems in the early stages of the contract and avoid "crisis management" later. If there is a lack of quality or performance at any milestone point, this needs to be communicated to the contractor without delay and the appropriate changes or corrections made. This lends a posture of competent management throughout the project and provides the leadership required for successful contract completion.

- • **Monitoring Plan**

One means of defining the specific monitoring methods appropriate to the particular service and the monitoring activities to be completed for an individual contractor is a monitoring plan. The plan can identify the tools to measure and assess contract performance and compliance, and the process for collecting information. Monitoring plans can also be used to decide which contracts to monitor, based on risk, and can also enable an agency to assess the contract management resources necessary to ensure adequate oversight. The level of monitoring should be commensurate with the importance or sensitivity of the service. Further, the plan can identify how monitoring activities might be coordinated between multiple state agencies providing funding to a contractor.

- • **Monitoring activities may include:**

- – **Periodic contractor reporting:** Require the contractor to submit progress reports or other appropriate data or reports, based on pre-defined criteria, and review the contractor's reports for verification of services provided and adherence to the contract. Substandard performance should be identified and addressed timely and appropriately.
- – **Invoice reviews:** Compare billings with the terms agreed upon in the contract. Ensure the costs or payments being charged are within the contract parameters.
- – **Other periodic contact with contractor:** On site visits to maintain contact with the contractor to review progress on a regular basis. Good contract monitoring includes a continuous dialogue with the contractor.
- – **Accountable Government Act Provisions:** Monitoring activities may also include the types of monitoring plans described in the contract in accordance with the Accountable Government Act and the rules implementing it. Chapter 10 provides additional information about the types of monitoring plans described in the rules.

Every communication with a contractor is an opportunity to monitor activity. Adequate documentation is essential for effective contract monitoring. Contract files should include copies of letters, meeting notes, and documentation of phone

conversations as evidence that conscientious monitoring has occurred during the period of the contract.

Fiscal monitoring includes a review of the contractor's invoices and supporting documentation. Before authorizing payment, contract managers should ensure the contractor has adequately demonstrated the satisfactory delivery of services as agreed to in the contract. Contract managers should verify the accuracy of the contractor's invoices and documentation, whether billings are consistent with contract requirements, and whether total payments are within the limits set by the contract. Contract managers should ensure that payment documentation is on file.

8.2 MANAGING PAPER

In addition to monitoring contract performance, you must also make sure that the service provider has provided all of the “paper” required by the contract. For example, if your contract requires the service provider to provide the agency with a certificate of its insurance coverage, you need to make sure that you get the certificate and that it includes the coverage that it is supposed to include. A copy should be kept in your contract file. If your contract requires the service provider to provide the agency with other items (such as evidence that it holds an active license or any necessary certifications), you should make sure that you have received those things as well.

8.3 MANAGING INFORMATION TECHNOLOGY (IT) CONTRACTS

A clear and concise Statement of Work with detailed design and operational specifications and standards, tasks, resources, deliverables, work plan, milestones, etc. managed by a project manager/team is an effective tool for managing an IT (or any other) contract. If necessary provide project management training to the internal staff assigned to the project, or hire consultants with project management, Quality Assurance (QA) and Independent Verification and Validation (IV&V) skills as necessary.

Developing a clear and concise statement of work is the challenge. The better the quality and precision of the statements of work, the more opportunity to monitor the work, control costs, monitor time, reduce and/or eliminate scope creep, review deliverables and improve your chance of success. The more ambiguous, the greater the potential for problems to occur, loss of control, overruns and failure.

In addition to design and operational specifications (mandatory requirements), statements of work should also include a project work plan, performance expectations, and payment milestones. A manageable change control procedure is a must as it is unlikely that you will be able to predetermine and include all of the issues, aspects, and changes and conditions that may arise prior to final acceptance and completion of the project (the longer the performance period the more changes that are likely).

Establish a review and acceptance testing procedure, document results of acceptance testing, and send notices and reports to the vendor identifying any and all deficiencies that need to be corrected. It is a good practice to include language in the contract that permits you to withhold or retain all or a portion of payments to be made to the vendor until deliverables have been satisfactorily provided and the system meets all specifications, performance standards and has passed acceptance testing. A warranty period (e.g., one-year warranty) should commence following the State's acceptance of the entire project or system.

8.4 REVIEWING INVOICES FOR PAYMENT

Contract payment is the process by which the contractor submits invoices for reimbursement of service and receives payment. The contract manager, who is responsible for evaluating performance of the contract, must carefully audit the contractor's requests for payment to verify the accuracy of all charges. The contract manager should determine if the number of hours or costs or payments are commensurate with the services or deliverables received. The contract manager must also verify that rates for the contractor or subcontractor(s) are as stated in the contract. All documentation submitted must be verified to assure that all charges for the services are justified.

Travel expenses must also be verified to be consistent with contract terms. Most state contracts which require reimbursement shall not exceed the limits established for board and commission members in the Department of Revenue and Finance's Procedure 240.102VI. The reasonableness of personal vehicle mileage should be checked if allowable under the contract terms. Other types of expenses charged should be verified to determine if they are allowable under the contract and, if so, whether they are appropriate. Receipts should be attached for travel expenses, if required in the contract terms.

The contract manager must be conscientious to prevent any overpayment to the contractor. Contract overpayment is any payment in excess of the amount agreed upon for work performed or in violation of the terms of the contract. The contract manager must verify receipt of services in accordance with the contract prior to authorizing payment of invoices. If the services received are not acceptable or not in accordance with the contract terms, the contract manager should authorize payment only for those services received that are in accordance with the contract terms and conditions. The contract manager may withhold payment for all other charges until the contract terms and conditions have been met.

8.5 CORRECTIVE ACTION

Corrective action means action taken by the contractor that corrects identified deficiencies, produces recommended improvements, or demonstrates that deficiencies or findings are either invalid or do not warrant action.

Corrective action is suggested when identified deficiencies are serious (for example, a failure to complete key deliverables by dates mandated by the Legislature) or where less formal means have failed. Contract problems should be addressed immediately, before they become recurring or serious. Contract managers should check to see if

their agency or administrative unit has guidelines or directives for taking corrective action. If so, follow those guidelines or directives.

Serious contract problems that warrant corrective action include:

- – Failure to produce or submit key deliverables
- – Significant audit or monitoring findings
- – Inferior quality of services
- – Failure to perform all or part of the contract
- – Late performance
- – Late submission of reports on a recurring basis

For the staff completing corrective action with contractors, typical responsibilities include:

- – Communicating contract remedies, as appropriate, when the contractor's performance is deficient.
- – Seeking specialist advice, including legal counsel, when unsure of the rights of either party or the correct action.

To address minor problems or first occurrences of problems, contract managers should:

- – Notify the contractor both verbally and in writing that a problem has been identified.
- – Notify the contractor of expectations for correcting the problem or, if appropriate, ask the contractor to advise how the problem will be corrected.
- – Specify a date or time when you expect the problem to be resolved or action taken.
- – Document conversations with the contractor by a memo to the contract file, and/or follow up with a written letter to the contractor.

To address recurring or serious contract problems, contract managers should:

- – Document conversations with the contractor and set time frames for corrective action.
- – Check to see if applicable law or regulations direct how corrective action must occur. If so, comply with the legal requirements.
- – Clearly identify the problem verbally and in writing. Be specific by using dates, number of occurrences, or other data that quantifies the problem. For example, “Paragraph 4 of your Contract states that you must submit a report by the 5th of each month. Your reports for May, June, and July were all submitted over 5 weeks after the due date, and we have not yet received your August report.”
- – Advise the contractor in writing about the requirements to correct the problem or, if appropriate, ask the contractor to submit a corrective action plan, including dates when corrective action will be completed. Set a deadline for submission of the plan. If this results in any changes to the contract, amend the contract.
- – Specify a date or time frame for resolution. Unless a shorter or longer time frame is warranted, expect corrective action to be completed within one month.
- – Track all corrective action to ensure completion.
- – If a deadline is missed or corrective action is otherwise not completed, follow up in writing immediately. Notify the contractor that a deadline has been missed and ask the contractor when the action will be completed. Advise the contractor that failure to comply with the corrective action plan could lead to termination of the contract. Note: Failure by contract managers to follow up on corrective action could be interpreted later by the court as a waiver.
- – If the corrective action is successful in resolving problems, notify the contractor in writing that resolution has been achieved. Remember to document this in the contract file.

8.6 WHEN A CONTRACT GOES BAD

Some contracts contain a provision for resolution of disputes. A dispute involves a difference of opinion between the agency and contractor about contract terms or expectations. When a dispute occurs, you should consult with your assistant attorney general about your options. You should be prepared to provide your assistant attorney general with copies of the contract, your contract management documentation, and you will also probably need to be prepared to answer questions the assistant attorney general has. You should also be prepared to track down additional information that the assistant attorney general asks for.

8.7 CONTRACT TERMINATION

Contracts may be terminated prior to the completion date of the contract as provided under the contract terms.

- • **Termination Upon Notice**

The termination upon notice clause is intended to handle changed conditions under the contract, particularly when the expectations of the parties have been subjected to substantial change.

- • **Termination for Lack of Funding**

The termination for lack of funding or nonappropriation is intended to provide an agency with the opportunity to get out of a contract if the legislature does not appropriate enough money to the agency to continue the contract or if a deappropriation leaves the agency with insufficient resources to continue the contract.

- • **Immediate Termination**

There are some situations when an agency will need to be able to terminate a contract immediately. For example, if an agency has a contract with a service provider that must be licensed to legally provide the contracted services and the service provider loses its license, the agency needs to be able to immediately

terminate the contract. The contract needs to have a clause that allows the agency to terminate the contract immediately.

- • **Termination for Cause**

To terminate a contract based upon the other party's default, the party asserting default must demonstrate that there has been a material breach in one or more of the terms or conditions of the contract. By invoking the termination for default clause, the agency is generally in a position to claim damages due to the other party's breach of the contract. Writing clear and specific contract language will help avoid this type of action.

The Attorney General's Office should always be contacted when an agency is considering terminating a contract.

8.8 AUDIT

Auditing is defined as a systematic process of objectively obtaining and evaluating documentation to ascertain the fairness of management's representation of financial statements, internal controls, and compliance with applicable laws and regulations.

Audits may be required by law, as is the case for federally funded contracts (refer to OMB Circular A-133, Audits of States, Local Governments, and Non-Profit Organizations at www.whitehouse.gov/OMB/circulars). When writing contracts, agencies should consider whether an A-133 audit is required and whether that meets the audit needs. If not, the agency may require an audit beyond those required by law. When law does not require an audit, state agencies should use a risk-assessment process to consider whether an audit of the contractor is needed. When an audit is deemed appropriate and necessary, the expectations for the audit scope, methodology and due date should be included in the written contract.

An audit can be designed to accomplish one or more of the following:

- – Provide reasonable assurance as to the financial information reported by or obtained from the contractor.
- – Assess the financial condition of a contractor.
- – Assess the internal control system of a contractor.
- – Assess the performance of a contractor.
- – Assess compliance with applicable laws and contract regulations.

While an audit can be an effective monitoring tool, it carries a cost. Therefore, it is incumbent that care be exercised in calling for audits.

Handling Questioned Costs or Payments

Questioned costs or payments are normally those costs or payments associated with an audit finding. These costs or payments can be handled in several ways.

First, a decision on whether or not to pursue recovery of the questioned costs or payments should be made. There may be good reasons not to pursue recovery of the questioned costs or payments.

Options for recovering questioned costs or payments may include:

- – Billing the contractor
- – Adjusting future payments until the questioned costs or payments have been recovered
- – Deducting the questioned costs or payments from the final payment

You may want to consult with your assistant attorney general about handling questioned costs or payments.

Contracts dealing with federal funds may require different processes. Also, it is important to note that when recovering questioned costs or payments, the repayment by the contractor is generally not an allowable cost for current contracts.

8.9 REVIEW AND IMPLEMENT CONTRACTOR'S FINAL PRODUCT

Once the contract has ended, contract managers are responsible for:

- – Following up on any activities that the contractor is completing (i.e., final report).
- – Ensuring all invoices are received and paid, and making final payments to the contractor.
- – Assessing whether objectives and outcomes have been met.

When contract work is completed, the contractor may be required to submit a final report. Not all contracts will require such a report, but when they do, the final written product should address, at a minimum, the following areas as appropriate to the type of consulting service provided:

- – Statement of the problem investigated or need addressed.
- – Description of the methodology used.
- – Alternative solutions or approaches available.
- – Selected solution or approach and reasons for selection.
- – Benefits or results to be realized.
- – Recommendations for further improvements.
- – Other matters which should receive management emphasis or attention.

Once results have been accepted, an agency is responsible for correcting identified problems and implementing the recommendations. Follow-through by agency management on work done by the contractor is critical to the success of the overall project. The final report should be thoroughly reviewed with the contractor to ensure that all conclusions, supporting logic and related information are understood by the agency.

When the contractor's final report is accepted by an agency, the contract manager, or other responsible agency personnel, should develop a monitoring plan detailing the steps necessary to implement the recommendations.

The work plan should take into consideration the following factors:

- – Which recommendations are to be implemented?

- – What agency resources are required to proceed with implementation?
- – Is staff sufficiently trained or prepared to proceed with any changes required?
- – What tasks are required to implement each recommendation?
- – Whose responsibility is it to complete each task?
- – How and when will implementation be accomplished?

Appendix I: http://das.gse.iowa.gov/procurement/AppI_ModelContract.pdf

Appendix J: http://das.gse.iowa.gov/procurement/AppJ_MonitoringTool.pdf